No. 75-88

In the Supreme Court of the United States

OCTOBER TERM, 1975

[redacted] Corporation, Inc., Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1398

S & E CONTRACTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 433 F. 2d 1373.

JURISDICTION

The decision of the Court of Claims was entered on November 30, 1970. The petition for a writ of certiorari was filed on February 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in a suit against the United States in the Court of Claims to recover the amount the contracting agency, in a proceeding under the standard dis-

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putes clause of the contract, found to be due to a government contractor, the United States may challenge, to the extent permitted by the Wunderlich Act (41 U.S.C. 321–322), the decision of the agency.

STATUTE INVOLVED

The provisions of the Wunderlich Act, 41 U.S.C. 321–322, are set forth at Pet. App. D1.

STATEMENT

This action was commenced by S & E Contractors against the United States, seeking to recover sums which S & E claimed were owed it under a favorable administrative determination by the Atomic Energy Commission acting pursuant to the standard disputes clause contained in a construction contract to which S & E and the Commission were parties.

The current controversy arose out of disputes between S & E and the Commission during the performance of the contract, which were submitted to the Commission's contracting officer for determination (Pet. App. A–2). S & E challenged the officer's denial of certain of its claims and, pursuant to the disputes clause of the contract, the matter was tried before a Commission hearing examiner in an adversary proceeding, with the contracting officer defending his denial of the claims. When the hearing examiner sustained eight of S & E's claims, the contracting officer sought an appeal to the Commission (*ibid.*). The Commission, which hears appeals on a permissive basis, restricted its review to four limited issues, affirmed the hearing examiner on seven of the eight claims and

ordered the case remanded to the contracting officer for negotiation and settlement (*ibid.*).[1]

The resulting settlement discussions were terminated, however, when the General Accounting Office, to whom a technical question on one claim had been directed, formally advised the Commission (46 Comp. Gen. 441) that the Commission's findings on the disputed claims were not supported by substantial evidence and were erroneous on matters of law (Pet. App. A2–A3). When the Commission thereupon advised S & E that it would not take any action inconsistent with the views of the General Accounting Office,[2] S & E commenced this action in the Court of Claims.

Cross motions for summary judgment were submitted, limited to the issues of the evidentiary substantiality and legal correctness of the Commission's decision sustaining S & E's claims (Pet. App. A3). The United States contended that the administrative determination was erroneous as a matter of law and was not supported by substantial evidence and accordingly, under the Wunderlich Act, 41 U.S.C. 321, was not final. The Commissioner of the Court of Claims did not reach the merits of the dispute, but

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[1] These procedures which were contained in 10 C.F.R. 2.1 *et seq.* (1962), are now obsolete. An Atomic Energy Commission Board of Contract Appeals was established in 1964 (10 C.F.R. 3.1 *et seq.*).

[2] Petitioner contends that the Commission never disavowed the administrative decision allowing S & E's claims. The Commission's decision to acquiesce in the Comptroller General's action was in effect a disavowal of its earlier ruling and precipitated the judicial review proceedings below.

recommended that judgment be entered in favor of S & E on the grounds that the Commission's decision upholding the claims precluded the United States from seeking judicial review based on the Wunderlich Act standards (*ibid.*).

The Court of Claims held that the government was entitled to judicial review of the administrative determination, and remanded the case to the commissioner for consideration of the government's contentions (Pet. App. A14). The court found nothing in the Wunderlich Act or its legislative history to suggest that the government should not enjoy the same right of review of agency decisions as contractors. In response to the argument that no controversy existed because the Commission was in effect attacking its own ruling sustaining S & E's claims, the court stated that the use of an independent hearing examiner sufficiently differentiated the role of the agency as an adjudicator from its role as one of the parties to the controversy (*ibid.*). The court did not pass on the validity of the General Accounting Office's independent review of the Commission's decision, finding that the sole effect of GAO's action was to bring the case before the court for consideration of the Wunderlich Act issues (Pet. App. A4).

Three judges dissented on the ground that there was no controversy once the agency had sustained S & E's claims. One of them stated that "the Wunderlich Act does not, and was never intended by Congress to, invest the federal agencies or their counsel with authority to challenge the decisions which the agencies themselves have made" (Pet. App. A44).

ARGUMENT

The decision below, interpreting the Wunderlich Act, 41 U.S.C. 321, to permit the United States as well as contractors to challenge agency determinations, under the standard disputes clause, of contract disputes on the limited grounds permitted by the Act,[3] is correct, supported by the Act's legislative history, and in line with earlier Court of Claims decisions. See *C. J. Langenfelder & Son, Inc.* v. *United States*, 341 F. 2d 600; *Acme Process Co.* v. *United States*, 347 F. 2d 538; *cf. United States* v. *Utah Constr. Co.*, 384 U.S. 394, 422. Petitioner's expressed fear that the prompt settlement of controversies under the disputes clause will be jeopardized by the decision is misplaced. Accordingly, review by this Court is unwarranted.

1. The Wunderlich Act was passed in response to this Court's decision in *United States* v. *Wunderlich*, 342 U.S. 98, that administrative decisions under the standard disputes clause in government contracts were final and not subject to judicial review. It specifically states that no provision of any contract entered into by the United States "shall be pleaded in any suit * * * as limiting judicial review" of agency decisions in specified instances. 41 U.S.C. 321. Nothing in the Act suggests that this broad provision for review should be limited to decisions adverse to a contractor. Surely if Congress had intended such a result,

[3] *I.e.*, that the decision of the agency is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." 41 U.S.C. 321.

it would have used explicit language. Cf. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140–141.

The legislative history of the Act, reviewed at length by the Court of Claims (Pet. App. A5–A11), confirms the view that Congress intended that judicial review should be available to both parties to a dispute—the government as well as the contractor. During the hearings on the proposed legislation which became the Wunderlich Act, numerous references were made by industry and government spokesmen alike to an expanded right of review which would work "both ways" and be equally available to contractors and the government. Hearings on S. 2487 before Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 2d Sess., pp. 9, 11, 12. The stated position of one of the legislation's sponsors, the Associated General Contractors of America, was, for example, that (*id.* at 29):

> [A]ny decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.

Thus, the principal argument advanced in favor of a legislative overruling of *United States* v. *Wunderlich*, 342 U.S. 98, was that both sides should be entitled to relief from arbitrary agency action.

Petitioner's argument that the government obtained no right of review from the Wunderlich Act is

premised on the fact that Congress did not adopt a proposal providing for review in the General Accounting Office of decisions under the disputes clause.[4] But it does not follow from the rejection of that proposal that Congress had abandoned the concept that the review which was guaranteed in the courts should be available to both sides of the dispute.[5]

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[4] The Court of Claims did not decide, and there is not presented here, any question of the extent of GAO's authority to contest a decision rendered under the disputes clause. As the court below pointed out (Pet. App. A–4), the Executive Branch here determined to contest the AEC decision, and if it has authority to do so, it is immaterial that that contest was touched off by GAO's questioning of the correctness of the decision.

[5] There are explanations for Congress' refusal to provide for GAO review of decisions under the disputes clause which are entirely consistent with the Court of Claims' holding that the Executive Branch can obtain judicial review of such decisions. For example, GAO review could have been considered an unwarranted enlargement of GAO's role with respect to government contracts; or it may have been thought that judicial review—for the benefit of both the government and contractors—was a sufficient remedy for the *Wunderlich* decision, so that GAO review as well would have been duplicative and time-consuming. These objections were repeatedly made during the Senate and House Committee hearings on the proposed legislation. See Hearings on S. 2487 before Subcommittee of the Senate Committee on the Judiciary, 82d Cong. 2d Sess., statement of O. R. McGuire, p. 41; statement of O. P. Easterwood, Jr., p. 120. Hearings on H.R. 1839, S. 24, H.R. 3634 and H.R. 6946 before Subcommittee No. 1 of the House Committee on the Judiciary, 83d Cong., 1st and 2d Sess., statement of California Manufacturers Association, p. 22; statement of National Federation of American Shipping Inc., p. 26; remarks of Congressman Celler, p. 36; statement of Leonard Niederlehner, p. 54; statement of Frederick Hines, p. 93–94; statement of Louis Dahling, p. 97; statement of Charles Maechling, Jr., pp. 105–106.

2. Petitioner argues that the government is bound by the Commission's decision favorable to petitioner in this case, particularly in view of the dual role of the Commission as administrator and litigant.* Yet there is nothing remarkable about the United States as a party with a pecuniary interest challenging an agency determination in court. *E.g., United States* v. *Interstate Commerce Commission*, 337 U.S. 426; cf. *Far East Conference* v. *United States*, 342 U.S. 570, 576. Moreover, the argument overlooks the settled rule that the United States can recover public funds wrongfully, erroneously or illegally paid out. *United States* v. *Wurts*, 303 U.S. 414, *Wisconsin Central Railroad* v. *United States*, 164 U.S. 190; *United States* v. *Bank of the Metropolis*, 40 U.S. 377; *J. W. Bateson Co.* v. *United States*, 308 F. 2d 510 (C.A. 5). A necessary corollary to this rule is that the United States may seek or obtain court review as part of the continuing executive responsibility for administering and enforcing government contracts. See 42 Opin. Atty. Gen. No. 33.

3. Finally, petitioner argues that the decision below will undermine the effect of the disputes clause in government contracts by fomenting litigation, causing

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*On this latter point, see *United States* v. *Utah Construction Co.*, 384 U.S. 394, 422, where this Court stated:

> In the present case the [AEC Contract Appeals] Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. * * *

long delays and overburdening the courts (Pet. 11–12). The government's occasional challenge to an agency decision under the disputes clause, however, has far less impact upon the finality of such decisions than does the contractors' invocation of their right to judicial review. In any event, Congress, in passing the Wunderlich Act, decided that judicial review was preferable to absolute finality at the agency level. In substance, petitioner would give renewed effect to the very policy considerations that Congress decided were not paramount.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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